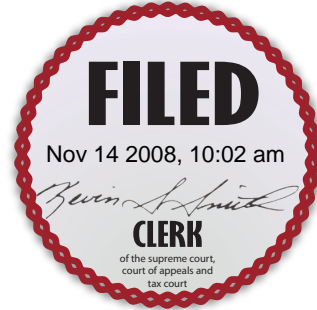


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

E.E.W., III,)	
)	
Appellant,)	
)	
vs.)	No. 09A02-0804-CV-368
)	
T.R.P. and F.E.P.,)	
)	
Appellees,)	

APPEAL FROM THE CASS CIRCUIT COURT
The Honorable, Leo Burns Judge
Cause No. 09C01-0612-AD-22

November 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

E.W. appeals the trial court's order granting the adoption of his daughter, M.L.C., by T.P. and F.P. We reverse and remand.

Issues

The issues before us are:

- I. whether the trial court properly allowed E.W.'s attorney to withdraw his appearance; and
- II. whether the trial court violated E.W.'s due process rights by proceeding with the final adoption hearing without allowing E.W. to obtain new counsel.

Facts

M.L.C. was born out-of-wedlock in 2004. M.L.C. has been in the continuous care of T.P. and F.P. since her birth, and they were named her guardians in October 2005. In December 2006, T.P. and F.P. filed a petition to adopt M.L.C. E.W. decided to contest the adoption, and he hired attorney James Knight to represent him.¹ E.W.'s paternity of M.L.C. was established in October 2007.

The trial court scheduled a final adoption hearing for February 21, 2008. On February 19, 2008, Knight filed a motion to withdraw his representation of E.W. The trial court addressed this motion at the beginning of the February 21 hearing. Knight gave the following reason for wanting to withdraw his appearance:

¹ M.L.C.'s mother consented to the adoption.

In a general sense, Judge, I'll just leave it that there's been, I suppose I'll say issues that I brought to my client's attention that I requested that he address that have not been addressed, and because those have not been addressed those impact on my ability to continue to zealously represent him in this matter.

Tr. Feb. 21, 2008 hrg. p. 5. The nature of these issues is not revealed by the record; Knight said he brought them to E.W.'s attention in two letters from December 2007 and January 2008, and in a December face-to-face appointment. E.W. subsequently indicated to the trial court that he did not have "any dispute with the fact that Mr. Knight contends that he has made efforts to contact you and that he hasn't been able to get the job done." Id. at 6. As a result, the trial court granted Knight's motion to withdraw, and he apparently left the courtroom.

E.W. then told the trial court he was not prepared to proceed alone and requested a continuance so he could obtain another lawyer. E.W. said he did talk to Knight about his case in December and was aware Knight had mentioned some problems with his case, but that Knight had never said he would withdraw from the case. E.W. also indicated that he had not had contact with Knight for approximately the previous sixty days.

The trial court denied E.W.'s continuance request and proceeded to the merits of the adoption. E.W. presented no evidence and did not cross-examine witnesses. The trial court granted the adoption petition, and E.W. now appeals.

Analysis

We begin by noting that T.P. and F.P. have not filed an appellee's brief. When an appellee has not submitted a brief we need not undertake the burden of developing an argument on the appellee's behalf. Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006). Rather, we will reverse the trial court's judgment if the appellant presents a case of prima facie error. Id. Prima facie error means at first sight, on first appearance, or on the face of it. Id. If an appellant is unable to meet this burden, we will affirm. Id.

I. Motion to Withdraw Appearance

E.W. first contends the trial court erred in permitting Knight to withdraw his appearance at the beginning of the final adoption hearing. The decision whether to grant a motion to withdraw is left to the trial court's discretion. Smith v. Smith, 779 N.E.2d 6, 8 (Ind. Ct. App. 2002). An abuse of discretion exists if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id. A trial court may refuse a motion for permission to withdraw if there will be a resultant delay in the administration of justice. Id. It also should be noted that parents who contest the adoption of their child by a third party have a statutory and constitutional right to counsel, just as if they were involved in a termination of parental rights action. See Bauer v. McClure, 549 N.E.2d 392, 394-95 (Ind. Ct. App. 1990).

In Smith, we reversed a trial court's denial of a motion to withdraw on interlocutory appeal where the facts revealed the following: the attorney filed the motion to withdraw in December 2001 and a final hearing was scheduled for January 11, 2002; the client was aware of the final hearing date; there was a breakdown in the attorney-

client relationship; the attorney had previously informed the client of her intent to withdraw by letter; and the motion to withdraw finally was denied in April 2002 after the final hearing had been continued to May 31, 2002. We held that under these facts, the client would have had ample time to secure new counsel if the motion to withdraw had been granted, the client failed to show he would have been prejudiced if the motion was granted, and there was nothing to indicate the trial court denied the motion in order to prevent a delay in the administration of justice. Smith, 779 N.E.2d at 9. Thus, we reversed the denial of the motion to withdraw. Id.

By contrast, we held the trial court abused its discretion by permitting withdrawal in D.A. v. Monroe County Department of Child Services, 869 N.E.2d 501 (Ind. Ct. App. 2007). The attorney in this termination of parental rights case sought to withdraw because the client had never kept an appointment with or ever met the attorney. However, although the attorney moved to withdraw approximately six weeks before the final termination hearing, she did not inform the client of her intent to withdraw beforehand, nor did she inform him of the date of the final hearing. The client also did not receive notice of the motion to withdraw. The trial court granted the motion to withdraw on the day before the final hearing, and then proceeded to conduct the final hearing the next day without the client or his attorney present, resulting in the termination of his parental rights. We held the client was unfairly prejudiced by his attorney's withdrawal and that the trial court abused its discretion in allowing it. See D.A., 869 N.E.2d at 509.

Here, we conclude on the record before us and in light of the prima facie error rule that the trial court abused its discretion in allowing Knight to withdraw his appearance. Although it does appear that E.W. was aware of some issues Knight was having with representing him, he testified at the final hearing that he did not know Knight was planning to withdraw his appearance. There is no evidence in the record to contradict this testimony. Moreover, Knight's explanation as to why he wanted to withdraw was vague, although we acknowledge that ethical considerations may have limited that explanation. Knight also filed his motion to withdraw just two days before the scheduled final hearing and the motion was granted at the very beginning of that hearing. Clearly, E.W. had no opportunity to obtain new counsel in a proceeding for which he had a statutory and constitutional right to counsel. Under the circumstances, Knight's motion to withdraw should have been denied, particularly since the trial court was intent upon conducting the final hearing without granting any continuances.

II. Due Process

This brings us to the next issue, E.W.'s claim of a violation of his due process rights, which is inextricably intertwined with the granting of Knight's motion to withdraw. In D.A., we did not reverse solely upon the basis of the improper granting of the attorney's motion to withdraw, but in conjunction with the violation of the client's due process rights occasioned by the withdrawal. See D.A., 869 N.E.2d at 512. See also Lawson v. Marion County Office of Family and Children, 835 N.E.2d 577, 581 (Ind. Ct. App. 2005) (holding father's due process rights were violated where father's attorney was

excused from termination of parental rights hearing, after which evidence detrimental to father was introduced). When the parent-child relationship is terminated, which is what occurs when an adoption is granted over a parent's objection, it must happen in a manner that meets the requirements of due process. See D.A., 869 N.E.2d at 510. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Id. (quoting Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976)).

Keeping in mind that we have no appellee's brief to refute E.W.'s arguments for reversal, we conclude that his due process rights were violated. E.W. unexpectedly was thrust into a situation in which he was facing the termination of his parental rights without the assistance of counsel. E.W. requested a continuance for the purpose of hiring a new attorney but the trial court denied this request. E.W. also indicated to the trial court that he was not prepared to proceed without the assistance of an attorney. Indeed, E.W. presented no evidence and conducted no cross-examination of witnesses. Perhaps an attorney could have done no better, but the fact remains E.W. was entitled to the assistance of an attorney.²

We reverse the trial court's decree of adoption, believing that continuing forward with the final hearing after E.W.'s attorney unexpectedly and at the last minute withdrew from the case deprived E.W. of the opportunity to be heard in a meaningful manner. The trial court, faced with Knight's motion to withdraw filed just two days before the final

² Again, there is no appellee's brief and thus no claim of any kind that E.W. had waived his right to an attorney.

adoption hearing, essentially had two choices that would have complied with due process requirements: it could have denied the motion to withdraw on the basis that allowing withdrawal could delay the administration of justice, or it could have granted the motion to withdraw but also grant E.W.'s continuance motion.

Conclusion

Although we are fully cognizant that the continued stability of M.L.C.'s life is at stake here, we are compelled to reverse the trial court's decree of adoption and to remand for further proceedings consistent with this opinion.

Reversed and remanded.

DARDEN, J., concurs.

FRIEDLANDER, J., concurs in result with separate opinion.

**IN THE
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E.E.W., III)	
)	
Appellant,)	
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)	
Appellee.)	
)	

FRIEDLANDER, Judge, concurring in result

I concur in the reversal of the order of adoption. In so doing, I echo the observation made by the Majority in more than one instance that, in light of the state of the record before us, the appellees’ failure to file a brief compels this result. I write separately, however, to clarify that I do not wholly subscribe to the views expressed in the discussion of Issue II regarding due process.